

T & TT ENTERPRISE SDN BHD

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v.

LEMBAGA PEMBANGUNAN DAN LINDUNGAN TANAH

COURT OF APPEAL, PUTRAJAYA

B

LOW HOP BING JCA

ZAINUN ALI JCA

HASAN LAH JCA

[CIVIL APPEAL NO: Q-02-944-07]

19 NOVEMBER 2008

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CONTRACT: *Building contract - Contractor's claim for loss and damages - Whether landowner liable for act of developer in suspending engineering works - Whether parties intended an agency relationship - Contracts Act 1950, s. 179*

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AGENCY: *Creation - Power of attorney - Intention to create principal-agent relationship - Whether clearly and unequivocally expressed - Contracts Act 1950, s. 179*

This was the appellant's appeal against the dismissal of its claim against the respondent for damages and loss incurred as a result of an alleged breach of agreement entered between the appellant and a developer company in the name of Arena Jernih Sdn Bhd ('Arena Jernih'). The facts were that Arena Jernih entered a development agreement ('DA') with the respondent to develop the respondent's piece of land and that a power of attorney ('PA') appointing Arena Jernih as the respondent's lawful attorney was executed to that effect. Arena Jernih then engaged the appellant to carry out the engineering works on the land but subsequently suspended the said works as a result of which the appellant suffered loss and damages. In its claim, the appellant sought to make the respondent principally liable for the loss and damages incurred as a result of Arena Jernih's default thereof.

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Held (dismissing the appeal with costs)

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Per Low Hop Bing JCA delivering the judgment of the court:

(1) The recital to the PA specifically and expressly included the DA as an integral part of the PA. Hence, both the PA and the DA should be called into question. It is trite law that where in a transaction more than one document or instrument is involved, the courts usually construe these documents

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- A together. Also, where the parties' intention is clearly and unequivocally expressed in the documents, the court will give effect to it. (paras 12 & 14)
- B (2) Where a party enters into a contract as an agent of the principal, s. 179 of the Contracts Act 1950 ('Contracts Act') would apply. Section 179 provides for the enforcement of the agent's contract against the principal. Section 179 renders a principal liable for the act of his agent. As between the principal and third persons, the contract or act of the agent is one which is binding on the principal. In order to invoke
- C s. 179, it was incumbent on the appellant herein to establish that the respondent was in fact the principal, failing which, the defendant could not be made liable therefor. (paras 17, 18 & 19)
- D (3) The DA expressly referred to in the PA was entered into between the respondent and Arena Jernih specifically for the development of the land in consideration of a cash payment basis, partly in kind or barter trade basis. The respondent granted the PA to Arena Jernih for the sole purpose of
- E facilitating Arena Jernih to carry out the obligations expressly set out in the DA. The barter trade was further confirmed by oral testimony at the trial proper. The PA and the DA must therefore be construed in line with the purpose for which the authority was given by the respondent to Arena Jernih and as
- F necessary for that purpose so as to include all incidental powers necessary for its effective execution. (para 24)
- G (4) Clause 16 DA clearly stated that Arena Jernih "shall bear all the costs and expenses incurred for the implementation" of the project concerned. The oral testimony, the PA and the DA clearly excluded the intention to create a principal-agent relationship between the respondent and Arena Jernih in so far as the engineering works were concerned. Hence, as a matter of law and fact, Arena Jernih was not the respondent's agent
- H *vis-a-vis* the transaction in question. That being the case, s. 179 Contracts Act was inapplicable and the respondent was not liable thereunder. (para 25)

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Bahasa Malaysia Translation Of Headnotes

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Ini adalah rayuan perayu terhadap penolakan tuntutan nya terhadap responden bagi mendapat ganti rugi dan kehilangan atas dakwaan pelanggaran kontrak yang dimasuki oleh perayu dengan syarikat pemaju yang dikenali sebagai Arena Jernih Sdn Bhd ('Arena Jernih'). Faktanya adalah bahawa Arena Jernih telah memeterai satu perjanjian pembangunan ('DA') dengan responden bagi membangunkan sebidang tanah responden, di mana satu surat kuasa wakil ('PA') melantik Arena Jernih sebagai wakil sah responden telah juga ditandatangani. Berikutnya Arena Jernih melantik perayu untuk menjalankan kerja-kerja kejuruteraan di atas tanah, tetapi kemudian telah menamatkan kerja-kerja tersebut sekaligus mengakibatkan perayu mengalami kerugian dan kehilangan. Dalam tuntutan nya, perayu mendakwa bahawa responden adalah bertanggung sebagai seorang prinsipal atas kerugian dan kehilangan yang ditanggung olehnya akibat dari keingkaran Arena Jernih tersebut.

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Diputuskan (menolak rayuan dengan kos)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

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(1) Mukadimah kepada PA secara khusus dan ekspres menjadikan DA sebagai sebahagian dari PA. Oleh itu, kedua-dua PA dan DA hendaklah diperiksa. Adalah menjadi undang-undang lazim bahawa di mana sesuatu transaksi itu melibatkan lebih dari satu dokumen atau instrumen, maka mahkamah akan mentafsirkan dokumen-dokumen tersebut secara bersesama. Juga, di mana niat pihak-pihak telah dizahirkan dengan jelas dan nyata di dalam dokumen, mahkamah akan memberi kesan kepadanya.

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(2) Di mana satu pihak memeterai kontrak sebagai seorang agen kepada prinsipalnya, maka s. 179 Akta Kontrak 1950 ('Akta Kontrak') akan terpakai. Seksyen 179 memperuntukkan penguatkuasaan kontrak yang dimasuki oleh agen terhadap prinsipalnya. Seksyen 179 menjadikan prinsipal bertanggung atas tindakan agennya. Berhubung kaitan di antara prinsipal dan pihak ketiga pula, kontrak atau tindakan agen tersebut akan mengikat prinsipal. Apapun, untuk menguatkuasakan s. 179, adalah perlu bagi perayu membuktikan bahawa responden adalah prinsipalnya, jika tidak defendan tidak menjadi bertanggung mengenainya.

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- A (3) DA yang dirujuk secara ekspres di dalam PA telah dimeterai di antara responden dan Arena Jernih khusus bagi membangunkan tanah atas balasan bayaran tunai atau separuh barang atau berdasarkan urusan niaga barter. Responden memberikan PA kepada Arena Jernih khusus untuk maksud obligasi-obligasi
- B yang ternyata di dalam DA. Urusniaga barter selanjutnya disahkan oleh testimoni lisan di perbicaraan sebenar. Oleh itu, PA dan DA hendaklah ditafsirkan selaras dengan maksud bagi melaksanakan yang mana kuasa diberi oleh responden kepada Arena Jernih serta bersesuaian dengan keperluan maksud
- C tersebut termasuk semua kuasa-kuasa sampingan bagi penguatkuasaannya.
- (4) Fasal 16 DA dengan jelas menyatakan bahawa Arena Jernih “hendaklah menanggung semua kos dan perbelanjaan bagi pelaksanaan” projek tersebut. Juga jelas bahawa testimoni lisan, PA serta DA semuanya menunjuk kepada ketiadaan niat untuk membentuk perhubungan prinsipal-agen di antara responden dan Arena Jernih setakat yang berkaitan dengan kerja-kerja kejuruteraan. Oleh itu, sebagai satu perkata fakta dan undang-undang, Arena Jernih bukanlah agen responden *vis-a-vis* transaksi berkenaan. Ianya mengikut bahawa s. 179 Akta Kontrak adalah tidak terpakai dan responden tidak memikul apa-apa tanggungan di bawahnya.
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- E
- F **Case(s) referred to:**
Bryant, Powis and Bryant Ltd v. LA Banque Du Peuple [1896] AC 170 PC (*refd*)
Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA (*refd*)
Magnum Finance Bhd v. Ling Sing Ping [1988] 1 LNS 34 HC (*fol*)
- G **Mars Equity Sdn Bhd v. Tis “ATA” Ashar Sdn Bhd** [2005] 1 CLJ 513 CA (*refd*)
Mohamed Isa & Ors v. Abdul Karim & Ors [1970] 1 LNS 82 HC (*refd*)
Watteau v. Fenwick [1893] 1 QB 346 HC (*refd*)
- Legislation referred to:**
- H Contracts Act 1950, s. 179
Interpretation Acts 1948 and 1967, s. 17A
- Other source(s) referred to:**
Bowstead on Agency, 13th edn, p 65
Chitty on Contracts, 28th edn, 1999 vol, para 12-063
- I *Indian Contracts and Specific Relief Acts*, p 2290

For the appellant - MS Sandhu (Bong Ah Loi with him); M/s Suhaili & Bong A

For the respondent - Keong Yi; M/s Yi & Co

[Appeal from High Court, Kuching; Suit No: 22-51-2002 III(1)]

Reported by Usha Thiagarajah B

JUDGMENT

Low Hop Bing JCA: C

Appeal

[1] After a full trial, the learned judge of the Kuching High Court (“the trial judge”) dismissed the appellant’s (“the plaintiff’s”) claim with costs. This is the plaintiff’s appeal against that decision. D

Plaintiff’s Claim

[2] The plaintiff’s claim against the respondent (“the defendant”) is for damages and loss sustained by the plaintiff as a result of an alleged breach of agreement entered into between the plaintiff and Arena Jernih Sdn Bhd (“Arena Jernih”) as the defendant’s attorney or agent for the supply of engineering works, thereby making the defendant primarily liable for RM230,019.75 due under a payment certificate, RM36,767.75 (ie RM11,210 plus RM25,557.75 being retention monies), RM30,000 being costs of standby machinery, and damages to be assessed, in addition to interest and costs. E F

Finding Of Facts By Trial Judge

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[3] At all material times, the defendant was the registered owner of the land known as “Lot 16 Block 1 Miri Concession Land District” (“the land”).

[4] The defendant entered into a development agreement dated 22 July 1994 with Arena Jernih (“the DA”) to develop the land into an industrial, commercial and housing estate (“the project”). Subsequently, on 8 August 2000, the defendant and Arena Jernih entered into a variation agreement. H

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- A [5] By power of attorney dated 26 June 1996 and registered at the Miri Land Registry as Instrument No. L6200/1996 (“the PA”), the defendant appointed Arena Jernih as its lawful attorney to do the acts, matters, deeds and things as specified therein. The recital to the PA expressly referred to the DA. The PA included, under
- B clause (11) thereof, the power to engage, employ, *inter alia*, contractors concerning the planning and development of the project.
- C [6] On or about 14 September 2000, Arena Jernih engaged the plaintiff to carry out certain engineering works on the land.
- [7] However, on 22 December 2000, Arena Jernih suspended the engineering works.
- D [8] Instead of suing Arena Jernih, the plaintiff filed a claim against the defendant.
- [9] In dismissing the plaintiff’s claim, the trial judge held that:
- (1) Upon a true construction of the PA and the DA, the PA was given for the purpose of facilitating Arena Jernih to carry out its obligations under the DA; and
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- (2) There was no agency relationship between the defendant and Arena Jernih and so the defendant could not be held liable for the plaintiff’s loss and damage arising from the supply of
- F engineering works by the plaintiff to Arena Jernih.

Agency Relationship

- G [10] Learned counsel Mr. M.S. Sandhu (assisted by Mr Bong Ah Loi) in attributing liability to the defendant submitted for the plaintiff that the PA should be construed within the four corners thereof. For this proposition, they relied on:
- (1) *Bryant, Powis and Bryant Ltd v. LA Banque Du Peuple* [1896] AC 170 PC;
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- (2) *Chitty on Contracts* 28th edn (1999) Vol. para 12-063; and
- (3) *Bowstead on Agency* 13th edn, p. 65.
- I [11] Mr. Keong Yi, learned counsel for the defendant, preferred a conjunctive construction of the PA and the DA, to support his contention that the defendant is not liable. He drew the court’s attention to:

(1) *Magnum Finance Bhd v. Ling Sing Ping* [1988] 1 LNS 34 HC; A
and

(2) *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 CA.

[12] Although the above submissions appear to be at variance B
with each other, a closer analysis reveals a common ground.
Construing the PA by reference to the four corners thereof
would involve a reference to the DA as well. This is because the
recital to the PA has specifically and expressly included the DA C
as an integral part of the PA. On the other hand, a conjunctive
construction of the PA and the DA would also involve a combined
reference to these two documents. Hence, both the PA and the D
DA are called into question here. It is trite law that where in a
transaction more than one document or instrument is involved, the
Courts usually construe those documents together: *Glamour Green*
Sdn Bhd, supra; *Mohamed Isa & Ors v. Abdul Karim & Ors* [1970]
1 LNS 82 HC and *Mars Equity Sdn Bhd v. Tis "ATA" Ashar Sdn*
Bhd [2005] 1 CLJ 513 CA.

[13] The "four-corner" construction as applied by eg, Lord E
Macnaghten in *Bryant, Powis and Bryant Ltd, supra*, and the
conjunctive construction as enunciated in *Glamour Green Sdn. Bhd,*
supra, *Mohamad Isa & Ors, supra*, and *Mars Equity Sdn Bhd, supra*,
in the context of the PA and the DA herein, practically share a
common denominator. F

[14] Where the parties' intention is clearly and unequivocally
expressed in eg, the PA and the DA, the court will give effect to
it: *Chitty on Contract, supra*.

[15] Now, the parties' submissions have raised the following G
question for determination:

Upon a true construction of the PA and the DA, in relation to
the contract for the supply of engineering works by the plaintiff
to Arena Jernih, is Arena Jernih an agent ie attorney of the H
defendant so as to render the defendant liable to the plaintiff for
the damage and loss suffered by the plaintiff as a result of Arena
Jernih's default?.

[16] This question is one of mixed law and fact. I

A [17] In law, where a party enters into a contract as an agent of the principal, s. 179 of the Contracts Act 1950 would apply. Section 179 provides for the enforcement of the agent's contract against the principal in the following words:

B 179. Enforcement and consequences of agent's contracts.

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

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[18] Section 179 renders a principal liable for the act of his agent. As between the principal and third persons, the contract or act of the agent is one which is binding on the principal: see the commentary on s. 226 (equipollent to our s. 179) *Pollock and Mulla* 12th ed, *Indian Contracts and Specific Relief Acts*, p. 2290.

(see also *Bryant, Powis and Bryant Ltd*, *supra*, per Lord MacNaghten at p. 180).

E [19] In order to successfully invoke the law contained in s. 226 in India and in our s. 179, it is incumbent on the plaintiff to establish that the defendant is in fact the principal, failing which, the defendant cannot be made liable therefor: see *Watteau v. Fenwick* [1893] 1 QB 346 HC per Wills J.

F [20] The relevant recital to the PA makes it abundantly clear that the PA was granted pursuant to the DA. It merits reproduction as follows:

G NOW THIS DEED WITNESSETH that pursuant to a Development Agreement entered between the Appointor and Appointee hereof on 22 July 1994 ("the Development Agreement"), we do hereby appoint Arena Jernih Sdn Bhd (NON-NATIVE) a company incorporated under the Companies Act, 1965 and having its registered address at Lot 559, 3rd Floor, Jalan Permaisuri, 98000 Miri, Sarawak ("the Appointee") to be
H our lawful Attorney from the date hereof either jointly and severally to do all or any of the following acts, matters, deeds and things:

I [21] Under cl. 1 of the DA, the defendant had appointed Arena Jernih as the developer to develop the land.

[22] Clause 12 thereof states that after developing the defendant's land, the developer (ie Arena Jernih) has the obligation to give certain number of buildings to the landowner (the defendant). Upon a conjunctive construction of the DA and the PA, it is clear that the contractual relationship is that of a joint venture agreement or arrangement between Arena Jernih as developer and the defendant as landowner.

[23] Clause 16 stipulates that the developer (Arena Jernih) shall be responsible for all works necessary in connection with the development of the land, and 'shall bear all costs and expenses incurred for the implementation'.

[24] The DA (expressly referred to in the PA) was entered into between the defendant and Arena Jernih specifically "for and on the development of the land" in consideration of cash payment basis or partly in kind or barter trade basis. The defendant has granted the PA to Arena Jernih for the sole purpose of facilitating Arena Jernih to carry out the obligations expressly set out in the DA. The 'barter trade' was further confirmed in the oral testimony of Ateng Jeros (DW1) at the trial. The PA and the DA must therefore be construed in line with the purpose for which the authority is given by the defendant to Arena Jernih, and as necessary for that purpose, so as to include all incidental powers necessary for its effective execution: see *Magnam Finance Bhd, supra*, and *Bowstead on Agency, supra*. This purposive approach is consistent with s. 17A of the Interpretation Acts 1948 and 1967 which expressly provide for the application of the purposive interpretation of written laws.

[25] Nothing can be clearer than cl. 16 of the DA that Arena Jernih "shall bear all the costs and expenses incurred for the implementation" of the project. The oral testimony, the PA and the DA clearly exclude the intention to create a principal-agent relationship between the defendant and Arena Jernih in so far as the engineering works are concerned. Hence, as a matter of law and fact, Arena Jernih is not an agent of the defendant *vis-à-vis* the transaction in question. That being the case, s. 179 is inapplicable here and so the defendant is not liable thereunder.

- A [26] A substantially similar factual matrix arose in *Magnum Finance Bhd, supra*, where the facts reveal that a joint venture agreement was executed between the land owner and the developer. A power of attorney was executed to enable the land owner to surrender the land to the developer for development of a housing project, and the land owner was entitled to 30% of every class of buildings to be constructed on the land. The costs of development was to be borne by the developer who was entitled to the balance of 70% of the buildings erected thereon. Siti Norma Yaakob J (later CJ(M)) held, *inter alia*, that the PA there was
- B merely limited to the joint venture and to carry into effect the terms and conditions thereof.
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Conclusion

- D [27] For reasons given above, the answer to the above question is in the negative. There is no merit in this appeal. It is hereby dismissed with costs. The decision of the trial judge is affirmed. Deposit to the defendant on account of taxed costs.

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